

**FILED**

at \_\_\_ O'clock &amp; \_\_\_ min. M

MAR 12 2003

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINABRENDA K. ARGOE, CLERK  
United States Bankruptcy Court  
Columbia, South Carolina (33)

IN RE:

**ENTERED**

C/A No. 02-15275-W

Alexander Richard Fitzgerald, II,

MAR 12 2003

**JUDGMENT**Debtor **KPD**

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court sustains Marsha Condell Davis's Objection to the confirmation of Alexander Richard Fitzgerald, II's ("Debtor") amended Chapter 13 Plan filed on February 28, 2003. As such, the amended Chapter 13 Plan does not comply with the requirements of Chapter 13, and the Court denies confirmation. Debtor is given ten days from the date of this Order in which to propose and file another amended plan. If no such amended plan is filed, this case may be dismissed without further notice or hearing.

  
UNITED STATES BANKRUPTCY JUDGEColumbia, South Carolina,  
March 12, 2003.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**  
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**MAR 12 2003**  
**BRENDA K. ARGOE, CLERK**  
United States Bankruptcy Court  
Columbia, South Carolina (33)

IN RE:

Alexander Richard Fitzgerald, II,

Debtor.

**ENTERED**

**MAR 12 2003**

**ORDER**

**KPD**

Chapter 13

THIS MATTER comes before the Court upon the confirmation hearing of Alexander Richard Fitzgerald, II's ("Debtor") amended Chapter 13 Plan filed on February 28, 2003.<sup>1</sup> Marsha Condell Davis ("Davis"), Debtor's former spouse, filed an Objection to the Plan, asserting that she should be scheduled as having a priority claim pursuant to 11 U.S.C. §507 because of Debtor's obligation to pay her spousal support.<sup>2</sup> Davis argues that her claim falls within §523(a)(5) and therefore is not included in Debtor's discharge pursuant to §1328(a)(2). Debtor disputes Davis's characterization of this obligation and argues that the debt is one arising from the parties' property settlement and that Davis's proper treatment is as an unsecured, nonpriority creditor. After considering the pleadings, evidence, and counsel's arguments, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052.<sup>3</sup>

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<sup>1</sup> Debtor filed his first Chapter 13 Plan on January 6, 2003. First Union National Bank ("First Union") objected to the Plan on January 14, 2003, and Davis objected to the Plan on January 17, 2003. On February 28, 2003, Debtor filed an amended Plan that resolves First Union's objection; however, the amended Plan provides the same treatment for Davis as the first plan.

<sup>2</sup> Further references to the Bankruptcy Code shall be by section number only.

<sup>3</sup> The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law

## FINDINGS OF FACT

1. Debtor and Davis were married on March 21, 1987. The parties did not have children together; however, Davis has one daughter from a prior marriage who is in her early twenties.
2. On April 27, 2000, the parties separated. Upon learning that Debtor committed adultery, Davis, with her daughter, moved from the former marital home to an apartment. Debtor continued to reside in the former marital home. Shortly after the separation, Davis filed for divorce, and, on September 22, 2000, the Family Court issued a Decree and Judgment of Divorce (the "Divorce Decree") granting the divorce on the statutory ground that Debtor committed adultery.
3. As part of the Divorce Decree, the Family Court incorporates the prior Order for Separate Maintenance and Support and Approval of Agreement entered on July 27, 2000 (the "Separate Maintenance Order"). The Separate Maintenance Order addresses the division of property and debts, support, attorneys' fees, and the execution of instruments.
4. In the provision of the Separate Maintenance Order titled "Division of Property and Debts," Debtor agrees to maintain the mortgage payments, taxes, insurance, and utilities related to the former marital home pending the sale of the property as an incident of support to Davis. This section further provides that Davis shall receive the proceeds from the sale of the former marital home less the payoff of mortgages and encumbrances, real estate commissions, taxes, and reimbursements to Debtor capped at \$12,000 for finishing and improving the home to enhance its marketability.<sup>4</sup> In the provision of the Separate Maintenance Order titled "Support," the parties agree that "[o]ther than the

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constitute Findings of Fact, they are so adopted.

<sup>4</sup> At the time of the divorce, the former marital home was partially unfinished; however, a portion of the home was completed. Prior to the divorce proceeding, the parties were able to reside in the completed portion of the home.

payments related to the marital residence, each party waives any type of spousal support from the other on a temporary and permanent basis.”

5. Correspondence from Debtor’s domestic relations attorney to Davis’s domestic relations attorney dated June 22, 2000 indicates that Debtor intended to maintain the mortgage payments, taxes, insurance, and utilities on the former marital home pending its sale as an incident of support. The correspondence further provides that the parties will waive any type of support with the exception of Debtor’s agreement to make the payments related to the former marital home.

6. The former marital home was in Davis’s name only, and the loan and mortgage documents were in her name only.

7. At the time of the divorce, Davis had gross income of \$3,800 per month. She worked part-time as a flight attendant for Delta Airlines, and, because of the divorce, she increased her work hours. Also at the time of the divorce, Davis was paying for her daughter’s college tuition and living expenses.

8. When the parties divorced, Debtor had gross income of \$12,000 per month. During the marriage, Debtor paid all housing and living expenses.

9. After the Divorce Decree was entered, Debtor’s payment of the obligations related to the former marital home were sporadic. Debtor made payments for approximately one year; however, the Family Court subsequently entered three separate orders finding Debtor in contempt for failing to pay monthly mortgage payments and the property taxes for 2000 and 2001. As a result of Debtor’s default, the former marital home was in foreclosure and also positioned be sold at a tax sale.

10. In early 2002, Davis sold the former marital home for \$500,000. The sale was made under

the threat of a foreclosure or tax sale. The sales price was substantially lower than what Davis thought the home would be worth if it were completed and fully finished, which was \$635,000.<sup>5</sup>

11. The mortgage lender forgave the deficiency Davis owed after the sale.

12. Debtor did not deduct the mortgage payments as alimony for tax purposes. Davis did not treat Debtor's mortgage payments as income for tax purposes.

13. On December 20, 2002, Debtor filed his Voluntary Petition seeking Chapter 13 relief.

14. On January 28, 2003, Davis filed her Proof of Claim indicating an unsecured priority claim totaling \$47,408.46. The parties stipulate that the amount of the claim is valid and not at issue in this proceeding.

### CONCLUSIONS OF LAW

Pursuant to §1322(a)(2), a Chapter 13 plan shall provide for full payment of all claims entitled to a priority under §507. Allowed claims for debts to a former spouse for alimony, maintenance, or support in connection with a separation agreement or divorce decree are entitled to priority status pursuant to §507(a)(7). The language of §507(a)(7) mirrors the language contained in §523(a)(5), which sets forth exceptions to discharge. Likewise, §1328(a)(2) excepts from discharge any obligation for support as defined by §523(a)(5). Thus, the issue before the Court is whether Debtor's obligation under the Separate Maintenance Order is in the nature of alimony, maintenance, or support. Deciding this issue determines whether the claim at issue has priority and is paid in full and excepted from Debtor's discharge or treated as an unsecured, nonpriority claim that is dischargeable. See, e.g. In re Falcon, C/A No. 96-70897-B, slip op. at 4 (Bankr. D. S.C. Jul. 22, 1996).

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<sup>5</sup> Davis testified that the home was never completed when she owned it.

When determining the nature of an obligation incurred in a separation agreement or divorce decree, courts usually consider the intent of the family court. See Baker v. Baker (In re Baker), 274 B.R. 176, 188 (Bankr. D. S.C. 2000) (citing Robinson v. Robinson (In re Robinson), 193 B.R. 367, 373 (Bankr. N.D. Ga. 1996)). However, as this Court explained in Baker, it is often a difficult task for a bankruptcy court to determine a family court's intent; consequently, courts often consider other factors to determine the nature of the obligation. See id. Indeed, in Baker, the Court used a four-part test that considered (1) the actual substance and language of the agreement, (2) the financial situation of the parties at the time of the agreement, (3) the function served by the obligation at the time of the agreement, and (4) whether there is any evidence of overbearing at the time of the agreement that should cause the court to question the intent of a spouse. See id. at 189 (citing Catron v. Catron (In re Catron), 164 B.R. 912, 919 (E.D. Va. 1994), aff'd 43 F.3d 1465 (4<sup>th</sup> Cir. 1994)).

Applying the Baker factors in this case, the Court finds that the obligation reflected in Davis's Proof of Claim is one of support and that she is therefore entitled to priority treatment in Debtor's Plan. As to the actual substance of the agreement, the language of the Separate Maintenance Order refers to Debtor's payments related to the former marital home as support in two different places.<sup>6</sup> Moreover, the parties' financial situations at the time of the divorce indicate that Davis needed support and that Debtor was in a position to provide such support. Indeed, Davis was facing the end of a thirteen year marriage. In this marriage, Debtor had been paying the parties'

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<sup>6</sup> The Court notes that one of these references to the payments as support is in a provision of the Separate Maintenance Order titled "Division of Property and Debts." Although the provision's heading suggests that the obligation may be part of a property settlement, the specific language clearly indicates otherwise: "[Debtor] shall maintain the mortgage payments, taxes, insurance, and utilities on the marital residence pending the sale of the property and as an incident of support to [Davis]."

living expenses as well as the monthly mortgage payments. Davis grossed less than one-third of Debtor's gross monthly income, and she needed to support herself as well as her child from a previous marriage. The sum of these facts indicate that Debtor needed support when the parties divorced.

The function served by the obligation also indicates that it is one for support. Aside from the claim at issue, the Separate Maintenance Order provides for no other form of support to Davis. She permanently waives her right to alimony, other support, and any claim as to any type of insurance even though she could have arguably obtained one or all of these as a result of the parties' income disparity and Debtor's fault being the statutory basis for the divorce. The parties divide all assets and debts with the parties agreeing to be responsible for their own obligations. Yet, in contrast with the rest of the Separate Maintenance Order, Debtor agrees to pay all of the mortgage payments and taxes and insurance on the former marital home even though the home was titled in Davis's name only. Further, the Separate Maintenance Order provides that Davis will receive all of the proceeds from the sale of the home, excluding mortgages and encumbrances, taxes, real estate commissions, and an allowance to Debtor capped at \$12,000 for finishing and repairing the home. To the Court, the design of the Separate Maintenance Order singles out this one marital asset, provides it markedly different treatment from the other marital assets, and contemplates its use as a means of support to Davis. Indeed, the former marital residence would seem to be a likely candidate for equitable division where both parties receive some share of the equity; however, the parties seem to isolate this one particular marital asset and treat it as a means of providing support to Davis as the parties contemplate the sale proceeds going exclusively to Davis.

As to the final Baker factor, the Court finds that no evidence was presented indicating any

overbearing at the time of the agreement. In fact, correspondence dated June 22, 2000 from Debtor's domestic relations attorney describes Debtor's payments of the mortgage and other expenses related to the former marital residence as support. See, e.g. Tilley v. Jessee, 789 F.2d 1074, 1078 (4<sup>th</sup> Cir. 1986) (holding that one requirement necessary to establish that an obligation is in the nature of support is that the parties must have a mutual intent to create a support obligation). Further, the Court finds Davis's testimony convincing and credible that the parties viewed Debtor's obligation at the time to be one of maintenance and support.

The Court notes that Debtor raised several arguments that the claim is in the nature of a property settlement, including the parties' treatment of the mortgage payments for tax purposes, Debtor's obligation being fixed and based solely upon the sale of the former marital home, Debtor's current inability to pay the debt, and Davis no longer needing Debtor's support because she is working and has remarried. While tax treatment is a factor to consider, the Court concludes that, in light of the other factors under the Baker test, the claim at issue in this case is in the nature of alimony or support.<sup>7</sup> See Barr v. Barr (In re Barr), C/A No. 92-71579, Adv. Pro. No. 92-8125, slip op. at 4-5 (Bankr. D. S.C. Sept. 21, 1992) (using the debtor's failure to deduct his one-half mortgage payment as alimony as a factor indicating that the debt at issue was in the form of a property settlement). The Court is also not convinced that simply because an obligation is fixed and arguably nonmodifiable that it is automatically in the nature of a property settlement. See Kinder v. Kinder (In re Kinder), C/A No. 02-10519-W, Adv. Pro. No. 02-80342-W, slip op. at 4 (finding that the debtor's obligation to pay a lump sum or definite amount owed in monthly installments was in the

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<sup>7</sup> Finding of Fact #12 indicates that, for tax purposes, Debtor did not deduct these payments as alimony and Davis did not treat them as income.



nature of alimony or support); Drawdy v. Drawdy (In re Drawdy), C/A No. 83-01359, C-No. 83-1061 (Bankr. D. S.C. Dec. 13, 1984), aff'd C/A No. 85-323-15 (D. S.C. May 2, 1985) (finding lump sum award by the family court was alimony). Finally, although in Falcon the Court examined the present financial condition of the parties, the Court believes that, in determining the nature of the agreement under §523(a)(5), it should focus on the parties' financial conditions at the time of the divorce. See, e.g. Baker, 274 B.R. at 189; Ardis v. Ardis (In re Ardis), C/A No. 00-05757-W, Adv. Pro. No. 00-80185-W, slip op. at 9-10 (Bankr. D. S.C. May 16, 2001). Accordingly, the Court does not consider Debtor's present ability to pay or Davis's current employment status and remarriage.

In conclusion, the Court recognizes that this case varies from the typical support situation regarding mortgage payments where the debtor's obligation assists a former spouse in maintaining her residence in the former marital home. See Cribb v. Cribb (In re Cribb), 34 B.R. 862, 865 (Bankr. D. S.C. 1983) (holding that an obligation to pay the second mortgage on the former marital home was in the nature of alimony, maintenance, or support because the purpose of the obligation was to provide shelter to the debtor's former spouse and the parties' child); Seybt v. Seybt (In re Seybt), C/A No. 01-03549-W, Adv. Pro. No. 01-80128-W, slip op. at 4-5 (Bankr. D. S.C. Jan. 15, 2002) (same). In this case, Davis left the former marital home upon separating from Debtor, and she never planned to return to it. However, the Court believes Davis was justified in leaving the home upon learning of Debtor's adultery. Simply because she understandably did not continue to live in the former marital home with Debtor or plan to return and permanently reside there when she could not afford it does not preclude a finding that the obligation at issue was a means to provide lump sum support.

## CONCLUSION

From the arguments discussed above, it is, therefore,

**ORDERED** that Davis's Objection to Plan is sustained. Debtor's obligation to Davis is in the nature of alimony, maintenance, or support, and Davis's claim shall be treated as a priority claim;

**IT IS FURTHER ORDERED** that Debtor's current Plan cannot be confirmed, and the Court denies confirmation. Debtor is given ten days from the date of this Order in which to propose and file another amended Plan. If no such amended plan is filed, this case may be dismissed without further notice or hearing.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
March 12, 2003.